ORIGINAL

No. 91-6194

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MICHAEL CROSBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner could be tried in his absence after he knowingly and voluntarily failed to appear for trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 917 F.2d 362.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1991.[1] The petition for a writ of certiorari was filed

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[1] The opinion of the court of appeals originally was filed on October 16, 1990. Pet. App. A1. In that opinion, the court remanded to the district court for consideration of an issue unrelated to the issue presented by this petition, but the court of appeals retained jurisdiction over the case. Id. at A15. While the case was pending in the district court on remand, the court of appeals denied a petition for rehearing with suggestion

(continued...)

on October 21, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on 25 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 20 years' imprisonment, to be followed by five years' probation. Pet. App. A3. He was also ordered to make restitution in the amount of $240,035. Pet. 3. The court of appeals affirmed. Pet. App. A1-A15.

1. Petitioner and co-defendants Martin Cheatham, James Sannes, and Jack Cunningham devised a fraudulent scheme for selling silver medallions through the mail and by phone. Pursuant to the scheme, purchasers of the medallions were falsely told that a portion of the proceeds would be used to fund a memorial to veterans and were assured that the medallions would increase in value. Ultimately, 412 people bought 5,900 medallions for $550,000. Only about 400 medallions, however, were actually delivered to the purchasers.[2/]

[1/](...continued)
for rehearing en banc. Id. at C1. On September 30, 1991, the court issued an order affirming the judgment of the district court "nunc pro tunc to January 24, 1991." Id. at B1. While that order is somewhat ambiguous, we believe that it is appropriate in calculating the timeliness of the petition to consider the judgment of the court of appeals to have been entered on September 30, 1991.

[2/] The evidence at petitioner's trial is described in the opinion of the court of appeals affirming the convictions of co-defendants Cheatham and Cunningham. United States v. Cheatham, 899 F.2d 747, 748-750 (8th Cir. 1990).

2. On August 15, 1988, petitioner appeared for a pretrial conference, at which the district court set trial for October 12, 1988. On September 12, 1988, the clerk sent a notice to all counsel confirming the date of trial. On September 30, 1988, petitioner attended another pretrial conference, at which the court again advised the parties of the October 12 trial date. On October 7, 1988, petitioner appeared in court for a motions hearing, during which the court made yet another reference to the October 12 trial date. Pet. App. A2; Gov't C.A. Br. 6-7.

Although petitioner's counsel and his three co-defendants appeared for trial on October 12, 1988, petitioner failed to appear. The district court issued a warrant for petitioner's arrest and delayed the start of trial. United States Marshals attempting to execute the warrant were unable to locate petitioner. The Marshals reported to the court that petitioner appeared to have abandoned his residence. Pet. App. A2; Gov't C.A. Br. 7.

On October 14, 1988, the district court issued an order delaying trial until October 17, forfeiting petitioner's $100,000 bond, and finding that petitioner had "deliberately, voluntarily, knowingly, and without justification failed to be present at the designated time and place for the trial of the action." Pet. App. A2-A3. In the order, the court also found that there was no reasonable probability that petitioner could be located or that the trial could be rescheduled with petitioner in attendance. Pet. App. A3. The court noted that the government intended to

call 83 witnesses from all over the United States and Canada and to introduce more than 400 exhibits. The court accordingly found that rescheduling the trial or holding a separate trial for petitioner would impose a substantial burden on the government and the court. Based on its findings, the court held that petitioner had "voluntarily waived his constitutional right to be present during the trial" and that the "public interest in proceeding with the trial in the absence of * * * [petitioner] outweigh[ed] the interest of [petitioner] to be present during the conduct of the trial." Ibid.

Trial was held from October 17 through November 18, 1988, in petitioner's absence. Pet. App. A3. Petitioner was arrested in Florida on May 11, 1989. Gov't C.A. Br. 9.

3. The court of appeals affirmed. Pet. App. A1-A15. It rejected petitioner's argument that Fed. R. Crim. P. 43 prohibits a court from holding a trial after the defendant has absconded except when the defendant is present at the outset of the trial. Id. at A3-A5.[1/] The court determined that "the defendant waives

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[1/] Fed. R. Crim. P. 43 provides in relevant part:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided.
>
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

(continued...)

his Rule 43 right to be present during trial when he voluntarily absents himself from the courtroom." Id. at A5. The court held that, in light of petitioner's voluntary failure to appear, the district court's efforts to locate petitioner, the number of witnesses, and the difficulty of reassembling them, the district court had not abused its discretion by holding trial in petitioner's absence. Id. at A8-A9.[2/]

ARGUMENT

Petitioner contends (Pet. 3-10) that the district court violated his rights under the Constitution and Fed. R. Crim. P. 43 by holding trial in his absence. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

Although a criminal defendant has a right to be present at all stages of the trial, that right may be waived. In Diaz v. United States, 223 U.S. 442, 445, 454-459 (1912), this Court held that such a waiver occurred when a defendant who had appeared at the start of the trial voluntarily absented himself from later

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[1/](...continued)

> (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial) * * *.

[2/] The court of appeals also rejected petitioner's claims that the district court erred in refusing to replace petitioner's court-appointed counsel five days before trial and in conditioning petitioner's probation on the payment of restitution to his victims. Pet. App. A9-A15. Petitioner does not renew those claims in this Court.

proceedings. In Taylor v. United States, 414 U.S. 17, 19-20 (1973), the Court reaffirmed its holding in Diaz and emphasized that "mere voluntary absence from * * * trial" may constitute an "effective waiver."

Contrary to petitioner's contention (Pet. 4-9), this Court's decisions in Diaz and Taylor did not turn upon the fact that the defendants in those cases were present at the commencement of their trials. In Diaz, the Court quoted with approval the reasoning of a court of appeals decision that had concluded that a defendant may waive the right to be present at trial by voluntarily failing to appear:

> The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of the courts and juries and turn them into a solemn farce * * *. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

223 U.S. at 458 (quoting Falk v. United States, 15 U.S. App. D.C. 446, 460-461 (1899), cert. denied, 181 U.S. 618 (1901)). In Taylor, the Court similarly reasoned that "the governmental prerogative to proceed with a trial cannot be defeated by conduct of the accused that prevents the trial from going forward." 414 U.S. at 20 (quoting Illinois v. Allen, 397 U.S. 337, 349 (1970) (Brennan, J., concurring)).

The reasoning of Diaz and Taylor fully applies when, as in this case, the defendant voluntarily and knowingly fails to appear for the commencement of the trial. A defendant who fails to attend even the start of his trial demonstrates at least as much disregard for the judicial system as a defendant who is present at the start of trial but later fails to appear. In either situation, suspending the trial would reward such egregious conduct by preventing a trial "until the accused person himself should be pleased to permit it." Diaz v. United States, 223 U.S. at 457 (quoting Falk v. United States, 15 U.S. App. D.C. at 454). This Court's decisions in Diaz and Taylor make clear that the Constitution does not require such a result.

Nor is that result required under Fed. R. Crim. P. 43. While Rule 43(a) recognizes the defendant's right to be present throughout the trial, Rule 43(b) makes it clear that the defendant may waive that right. Rule 43(b) provides that "the progress of [a] trial * * * shall not be prevented" when a defendant, "initially present, * * * is voluntarily absent after the trial has commenced." The Rule states that under those circumstances, "the defendant shall be considered to have waived the right to be present." Fed. R. Crim. P. 43(b). Petitioner argues (Pet. 6) that Rule 43(b), by implication, forbids the conduct of a trial in absentia when a defendant is not initially present for the trial but, instead, absconds prior to the trial's commencement. The Rule, however, should not be read in that fashion. As the court of appeals recognized, Rule 43(b) was

intended merely to restate the holding in Diaz. Pet. App. A5 (citing Advisory Committee note on Fed. R. Crim. P. 43). Thus, the Rule addresses the situation of a defendant who initially appears for trial, but later fails to appear, because that was the situation before the Court in Diaz. By providing for a waiver in that situation, the Rule was not intended to preclude a waiver in other situations. As the court of appeals correctly concluded, Pet. App. A3-A6, Rule 43(b) does not prevent the court from determining that a waiver has occurred when a defendant who has been arraigned and released on bail knowingly and voluntarily fails to show up for trial at all.

Every other court of appeals to address the issue has likewise concluded that a defendant's knowing and voluntary failure to appear for trial may constitute a waiver of the right to be present for the trial. See United States v. Houtchens, 926 F.2d 824, 826-827 (9th Cir. 1991); United States v. Sanchez, 790 F.2d 245, 248-252 (2d Cir.), cert. denied, 479 U.S. 989 (1986); United States v. Crews, 695 F.2d 519, 520-521 (11th Cir. 1983); United States v. Peterson, 524 F.2d 167, 184 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); Government of the Virgin Islands v. Brown, 507 F.2d 186, 189 (3d Cir. 1975); United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir.), cert. denied, 409 U.S. 1063 (1972).

The decisions cited by petitioner (Pet. 6 n.2) are not to the contrary. United States v. Hernandez, 842 F.2d 82, 84 (5th Cir. 1988); Government of the Virgin Islands v. George, 680 F.2d

13, 14-15 (3d Cir. 1982); United States v. Miller, 463 F.2d 600, 602-603 (1st Cir.), cert. denied, 409 U.S. 956 (1972); United States v. Garcia-Turino, 458 F.2d 1345, 1346 (9th Cir.), cert. denied, 409 U.S. 951 (1972); Pearson v. United States, 325 F.2d 625, 626-627 (D.C. Cir. 1963); and Parker v. United States, 184 F.2d 488, 490 (4th Cir. 1950), each involved a criminal defendant who voluntarily absented himself from trial proceedings after having appeared for the commencement of trial; in each case, the court applied Fed. R. Crim. P. 43 to uphold the conduct of a trial in the defendant's absence. In Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968), the court held that under Rule 43 a trial may be held in the defendant's absence when the defendant absconds after the start of the trial, if the defendant's absence is knowing and voluntary; the court remanded, however, for further proceedings on the issue of whether the defendant's absence in that case was knowing and voluntary. In Cross v. United States, 325 F.2d 629, 631-632 (D.C. Cir. 1963), the court reversed a conviction, holding -- on facts quite different from those of the instant case -- that the evidence was insufficient to establish that the defendant had waived his right to be present throughout the trial. Finally, United States v. Hudson, 313 F. Supp. 422, 426-427 (D. Del. 1970), did not concern review of a conviction following a trial in absentia. Rather, it concerned a petition by sureties on a bail bond to vacate an order forfeiting the bond. In response to the petitioners' argument that they should not be penalized for the defendant's failure to

appear for trial because the trial could have been held in the defendant's absence, the district court in Hudson suggested that the defendant could not have been tried in his absence under Rule 43 because he was not initially present for the trial. Id. at 426. That suggestion was dictum, however, because the court went on to reject the petitioners' argument as "completely irrelevant" to the validity of the order of forfeiture. Id. at 427.

* * * * *

Petitioner does not challenge the determination by both courts below that he knew when the trial was scheduled to commence and that he voluntarily failed to appear on that date. Under those circumstances, the courts correctly concluded that he had waived his right to be present at the trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on January 21, 1992.

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January 21, 1992